72-1480

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1480

GLENN W. TURNER ENTERPRISES, INC., a Florida corporation, DARE TO BE GREAT, INC., a Florida corporation, GLENN WESLEY TURNER, HOBART WILDER, HARRY BRYANT ATKINSON, JACK E. O'BRIEN, ALFRED W. (AL) SMITH, LEROY BEALE, DONALD RAY (PETE) MONROE, HARRY D. EVERARD, GENE EARL ARTHUR and WILLIAM C. SANT,

Petitioners,

vs.

SECURITIES and EXCHANGE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners,

vs.

SECURITIES and EXCHANGE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, Glenn W. Turner Enterprises, Inc., a Florida corporation, Dare To Be Great, Inc., a Florida corporation, Glenn Wesley Turner, Hobart Wilder, Harry Bryant Atkinson, Jack E. O'Brien, Alfred W. (Al) Smith, Leroy Beale, Donald Ray (Pete) Monroe, Harry D. Everard, Gene Earl Arthur and William C. Sant, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, rendered in these proceedings on February 1, 1973.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, as yet unreported, appears in Appendix A, **infra,** pp. App. 1-13. The opinion of the United States District Court for the District of Oregon has been reported at 348 Federal Supplement 766, and a copy of that decision appears in Appendix B, **infra,** pp. App. 15-36.

JURISDICTION

The order and judgment of the United States Court of Appeals for the Ninth Circuit, was entered on February 1, 1973. See Appendix A, p. App. 1, **infra.** This Petition for a writ of certiorari was filed within 90 days of said date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

The Petitioners offer and sell to the public self-improvement, self-development, sales training and motivational courses. The purchaser of said courses may qualify to become a salesman to sell the Petitioners' courses to others, for which he is paid a commission for each course sold. The District Court enjoined the Petitioners from the offer and sale of the contracts to purchase said courses and to act as sales agent in the sale of the courses to others on the grounds that those contracts were "securities" within the meaning of the Securities Act of 1933 (15 U.S.C. §77b(1)) and the Securities Exchange Act of 1934 (15 U.S.C. §78c(a)(10)) in that they were "investment contracts", "certificates of interest or participation in a profit sharing agreement" and interests or instruments "commonly known as a security." The court of appeals affirmed solely on the grounds that the contracts were "investment contracts" and therefore securities. In holding that the Petitioner's contracts were "investment contracts" the court of appeals held that since someone other than the purchaser contributed "the essential managerial efforts" which will determine the failure or success of the enterprise, the contracts were investment contracts, even though the purchaser is himself active in selling the courses and earning his sales commissions and is therefore not depending "solely on the efforts of others" for profit. The questions presented are:

1. Whether a sales commission agreement pursuant to which the salesman is paid a fixed commission to sell courses and under which he can only earn money as a result of his efforts in selling courses, and is therefore **not** dependant

solely on the efforts of others for a profit, is an "investment contract" and therefore a security within the meaning of the Securities Act of 1933 (15 U.S.C. §77b(1)) and the Securities Exchange Act of 1934 (15 U.S.C. §78c(a)(10)).

2. Whether contracts whereby the salesman is only paid sales commissions on courses which he sells to others and is not entitled to share in the profits of the corporation granting him the right to sell its products are "certificates of interest or participation in a profit sharing agreement" and therefore Securities within the meaning of the Securities Act of 1933 (15 U.S.C. §77b(1)) and the Securities Exchange Act of 1934 (15 U.S.C. §78c(a)(10)).

3. Whether contracts which have been held by some state courts to be securities within the meaning of their state securities laws to be securities are therefore interests or instruments "commonly known as securities" within the meaning of the Securities Act of 1933 (15 U.S.C. §77b(1)) and the Securities Exchange Act of 1934 (15 U.S.C. §78c(a)(10)) where other state courts have held such contracts not to be securities although presented with the same facts and statutory language and where a United States District Court has held similar agreements not to be securities within the meaning of the federal securities laws.

STATUTORY PROVISIONS INVOLVED

15 U.S.C. §77b(1): The term "security" means any note, stock, treasury stock, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. §78c(a)(10): The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, or in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or, warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

STATEMENT OF THE CASE

The Securities and Exchange Commission filed, in the United States District Court for the District of Oregon, a Complaint for Injunction, and other relief Appointment of a Receiver, and an Accounting, and Disgorgement of Profits. The gravamen of the complaint was plaintiff's assertion that the motivational and sales training courses offered for sale by the Petitioners (known as Adventures I, II, III and IV, and the $1,000 Plan) were securities within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934, and were being sold violation of the registration and anti-fraud provisions of the federal securities laws.

The Petitioners moved to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief could be granted, contending that the courses offered and sold were not securities within the meaning of the federal securities laws.

Three of the courses offered by the Petitioners (Adventures III, IV and the $1,000 Plan) include the right for the purchasers of said courses to become salesmen for the Petitioners in selling the courses to others, receiving a sales commission for each course sold. These courses are sold by the salesman by personal solicitation, door to door, and in group meetings. The salesman must find prospects and persuade them to attend meetings; at the meetings the salesmen participate in the presentation and continue, both during and after the meeting, to try and persuade their prospects to purchase the Petitioners' courses. The salesmen are not dependent upon the company's profits for their income, since their only source of money is from

the commissions paid them for sales of the Petitioners' courses.

The District Court denied the defendants' motions to dismiss and held that Adventures III and IV and the $1,000 Plan as offered and sold by the corporate defendants, DARE TO BE GREAT, INC. and GLENN W. TURNER ENTERPRISES, INC., were contracts commonly known as securities, investment contracts, and certificates of interest or participation in profit-sharing agreements, and, therefore, securities within the meaning of the federal securities laws, and that it had jurisdiction over this case, and enjoined the offering and selling of these courses and any security of the same type by the defendant corporations, DARE TO BE GREAT, INC. and GLENN W. TURNER ENTERPRISES, INC., pending a final decision in this case.

The Court of Appeals for the Ninth Circuit affirmed, holding that even though, under Adventures III, IV and the $1,000 Plan the investor or salesman did not depend "solely" on the efforts of others for profits, that those contracts were "investment contracts" and therefore securities. In so holding, the court of appeals declined to follow the test for an investment contract as set forth in **Securities and Exchange Commission v. W. J. Howey Co.**, 328 U.S. 293 (1945) but instead adopted the test that an investment contract is present whenever the efforts of others are the essential managerial efforts which affect the success or failure of the enterprise, regardless of whether the investor must exert efforts in the production of profits from the enterprise. Having found that the Adventures III, IV and the $1,000 Plan were "investment contracts" the court of appeals did not rule on whether

those contracts were also "certificates of interest in a profit-sharing plan" or "in general any interest or instrument commonly known as a security."

REASONS FOR GRANTING THE WRIT

1. The Court below has decided a substantial federal question in a way which is in conflict with the applicable decisions of this Court.

The court of appeals recognized that this Court has defined the term "investment contract" as used in the Securities Act of 1933 and the Securities Exchange Act of 1934 as follows:

> The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. **SEC v. W. J. Howey Co.**, 1945, 328 U.S. 293 at 301; **SEC v. Joiner Corp.**, 1943, 320 U.S. 344; **Tcherepnin v. Knight**, 1967, 389 U.S. 332.

The Court of Appeals found that the salesman or investor in Adventure III and IV and the $1,000 Plan "must himself exert some efforts if he is to realize a return on his initial cash out lay . . . Thus it can be said that the return or profits are not coming "solely" from the efforts of others." (Appendix A, pg. App. 11) However, the Court of Appeal concluded that, notwithstanding the clear definition of "investment contract" as pronounced by this Court, that it would not apply this Court's definition to the Petitioners' contracts but would adopt and apply a different test, to wit:

> . . . whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise. (Appendix A, pg. App. 12)

The court of appeals, in holding the Petitioners' contracts to be investment contracts even though the salesman or investor could only derive income by his personal efforts in selling the courses to others and is not therefore expecting profit solely from the effort of others, decided this substantial federal question in complete disregard of and conflict with the applicable decisions of this Court.

The district court held that the Petitioners' contracts were instruments or agreements "commonly known as securities" and therefore "securities" within the meaning of the federal securities laws solely on the basis that some state courts had found the Petitioners' or similar contracts to be securities under the state securities laws. This holding conflicts with this Court's decision in **Tcherepnin v. Knight, supra,** where this Court stated that "Federal law must govern whether shares having such legal form constitute securities under the Exchange Act . . ." And in **SEC v. Joiner, supra,** at page 124, this Court held that it must be ". . . proved as matter of fact that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce . . . as any interest or instrument commonly known as a 'security'."

Petitioners' contracts or similar agreements have been held, by an equal number of state courts not to be securi-

ties under various state laws. In addition, a Federal district court has held a similar contract not to be commonly known as a security within the meaning of the federal securities laws. **SEC v. Koscot Interplanetary, Inc.** (unreported) N.D. Ga. No. 17134 April 19, 1973. Therefore, this holding by the district court clearly conflicts with the decisions of this Court.

The District Court's holding that the Petitioners' contracts constituted "profit-sharing" agreements also conflicts with the decisions of this Court. While not specifically defining this term, this Court has, in general, held that the definitional terms of the federal securities laws should be interpreted as they are commonly understood in commerce and in light of the economic reality of the agreement under consideration. **SEC v. C. M. Joiner Leasing Corp., supra; SEC v. W. J. Howey & Co., supra; Tcherepnin v. Knight, supra.** A salesman for Petitioners is not promised and does not receive a share of the Petitioners' profits; instead he is paid a fixed commission on the sales he makes regardless of the Petitioner's profits. In view of the economic reality of this arrangement and the meaning of the statutory term itself, the Petitioners' contracts cannot be "profit-sharing" agreements within the meaning of the federal securities laws.

2. The decision of the court of appeals below is in conflict with the decisions of every other court of appeals on the issue of the proper test to determine what is in "Security" within the meaning of the Federal Securities Laws.

The Court of Appeals decision below as to the definition of an "investment contract" is in direct conflict

with the decisions of every other Court of Appeals which has ruled on this issue. **First Circuit: Lawrence v. SEC,** 398 F. 2d 276 (1 C.A. 1968); **Second Circuit: Movielab, Inc. v. Berkey Photos, Inc.,** 452 F. 2d 662 (2 C.A. 1971); **Fourth Circuit: John Hopkins University v. Hutton,** 422 F. 2d 1124 (4 C.A. 1970); **Fifth Circuit: Hooper v. Mountain States Securities Corp.** 282 F. 2d 195 (5 C.A. 1960); **Sixth Circuit: Graham v. Clark,** 332 F. 2d 155 (6 C.A. 1964); **Seventh Circuit: U. S. v. Herr,** 338 F. 2d 607 (7th C.A. 1964); **Eight Circuit: Cross v. Pasley,** 270 F. 2d 88 (8 C.A. 1959); **Tenth Circuit: Ahrens v. American-Canadian Bearer Co.,** 428 F. 2d 926 (10 C.A. 1970).

3. The decision below raises federal questions of great public importance.

Congress, in enacting the federal securities laws, chose to base its regulation of the interstate sale of securities on the system of registration of securities, prior to sale to the public, with the Securities and Exchange Commission and providing that in such registration full and fair disclosure concerning the securities to be sold would be thereby provided to the investing public. Severe civil and criminal penalties are provided for failure to register securities prior to their sale to the public. Therefore, the definition as to what is a security under federal law, and therefore what must be registered, is a question of central importance in the federal securities law. Since the business and investment community of this country must decide whether to register or not prior to sale, the definition defining what must be registered must be clear, must accurately isolate and identify the essential elements which comprise a security, and must be such as to be applicable, with reasonable certainty, in advance of the transaction in question.

The definition of "security" under the federal securities law as stated by this Court in **SEC v. W. J. Howey & Co., supra, SEC v. J. M. Joiner, supra** and **Tcherpnin v. Knight, supra,** accurately defines the essential elements to be found in every "securities" transaction and therefore is capable of application, in advance and with reasonable certainty, to any form of business arrangement. This Court's definition, since it deals not with particular business arrangements but with the essential factors found in every securities transaction, has proven to be flexible in covering diverse types of business arrangements. On the other hand, the new test advocated and adopted by the court of appeals below, is vague, seems to depend on an after-the-fact analysis of the relative importance of the various functions of the parties to a business arrangement and would therefore create great uncertainty and confusion as to the scope of the federal securities laws as well as extend that scope far beyond the limits which Congress intended.

The decision below raises issues of great importance to the orderly function and administration of the federal securities laws, issues which this Court should resolve.

CONCLUSION

The decision below is palpably erroneous. It disturbs the very basis of the federal securities law and would disrupt and undermine the proper and orderly administration of the federal securities law and would place an intolerable burden on this country's business, investment and legal communities which seek to comply with the provisions of that law. The present petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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Of Counsel for Petitioners

CERTIFICATE OF SERVICE OF MAIL

I HEREBY CERTIFY that three copies of the foregoing Petition were served upon Irwin Griswold, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, Walter P. North, Acting General Counsel, Securities and Exchange Commission, Washington, D.C. 20549, Leonard H. Rossen, Associate Regional Administrator, Securities and Exchange Commission, San Francisco Branch Office, 450 Golden Gate Avenue, San Francisco, California, 94102, and upon James E. Newton, Securities and Exchange Commission, 900 Hoge Building, Seatle, Washington 98104, by depositing same in the United States Mail at the United States Courthouse, 300 N.E. 1st Avenue, Miami, Florida, 33132.

Dated: _____

_____

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APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-2544

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

vs.

GLENN W. TURNER ENTERPRISES, INC., et al.,
Defendants-Appellants.

[February 1, 1973]

Appeal from the United States District Court
for the District of Oregon

Before: DUNIWAY, HUFSTEDLER, and TRASK,
Circuit Judges.

DUNIWAY, Circuit Judge:

This is an appeal from an order granting the Securities and Exchange Commission a preliminary injunction. The injunction prohibits offering and selling by appellants of certain of their "Adventures" and "Plans", and also any withdrawal by appellants of funds from the assets of the

corporate defendants other than in the regular course of business, Dare To Be Great, Inc. (Dare), a Florida corporation, is a wholly owned subsidiary of Glenn W. Turner Enterprises, Inc. The individual defendants are, or were officers, directors, or employees of the defendant corporations.[1]

The trial court's findings, which are fully supported by the record, demonstrate that defendants' scheme is a gigantic and successful fraud. The question presented is whether the "Adventures" or "Plan" enjoined are "securities" within the meaning of the federal securities laws. Of the five that Dare offers—Adventures I, II, III, and IV, and the $1,000 Plan—the court held that Adventures III and IV and the $1,000 Plan are securities. We affirm.

I. The Adventures and the $1000 Plan—the facade.

The five courses offered by Dare ostensibly involve two elements. In return for his money, the purchaser is privileged to attend seminar sessions and receives tapes, records, and other material, all aimed at improving self-motivation and sales ability. He also receives, if he purchases either Adventure III or IV or the $1,000 Plan, the opportunity to help to sell the courses to others; if successful he receives part of the purchase price as his commission. There is no doubt that this latter aspect of the purchase is in all respects the significant one.

Adventure I costs $300. The purchaser receives 1 portable tape recorder, 12 tape recorded lessons, and certain

[1]The district court found that defendant Sant had not been linked to these proceedings.

written material in notebooks. He is entitled to attend a 12-16 hour group session.

Adventure II includes Adventure I, and costs $700. The purchaser receives twelve more tape recorded lessons. He is offered approximately 80 hours of group sessions.

Adventure III includes Adventures I and II, and costs $2,000. The purchaser receives six more tape recordings, one notebook of written material called "The Fun of Selling," and a limited amount of written instructions and material, as well as thirty more hours of group sessions. The purchaser also receives a different sort of benefit. After fulfilling a few nominal requirements he becomes an "independent sales trainee," empowered to sell the Adventures. He receives $100 for each Adventure I, $300 for each Adventure II, and $900 for each Adventure III that he sells.

Adventure IV costs $5,000, and includes Adventures I, II and III. The purchaser receives six more tapes, the opportunity for thirty more hours of group sessions, the opportunity to attend two other week-long courses in Florida, at his own expense, and he may or may not receive a movie projector with six cartridge-type films. He also is now empowered to sell all of the Adventures to others. For selling Adventure IV he gets $2,500.

Finally, there is the $1,000 Plan. For this sum the purchaser receives the tape cassettes sold in Adventure II, but not the accompanying written material. He also receives some additional sales instruction, and may be entitled to a 24-hour group session. He may also sell the Plan, if he brings two individuals to the person who sold him the

Plan, and if these two also purchase the Plan from the first seller. If that occurs, he may then sell the Plan on his own, receiving $400 for each additional sale that he makes. If one brings three people into the scheme, he may sell the $1,000 Plan without buying it himself, and would earn the same $400 commission for each additional sale that he makes.

II. The Adventures and the Plan in operation.

It is apparent from the record that what is sold is not of the usual "business motivation" type of courses. Rather, the purchaser is really buying the possibility of deriving money from the sale of the plans by Dare to individuals whom the purchaser has brought to Dare. The promotional aspects of the plan, such as seminars, films, and records, are aimed at interesting others in the Plans. Their value for any other purpose, is, to put it mildly, minimal.

Once an individual has purchased a Plan, he turns his efforts toward bringing others into the organization, for which he will receive a part of what they pay. His task is to bring prospective purchasers to "Adventure Meetings."

A. The meetings.

These meetings are like an old time revival meeting, but directed toward the joys of making easy money rather than salvation. Their purpose is to convince prospective purchasers, or "prospects," that Dare is a sure route to great riches. At the meetings are employees, officers, and speakers from Dare, as well as purchasers (now "salesmen") and their prospects. The Dare people, not the purchaser-"salesmen", run the meetings and do the selling.

They exude great enthusiasm, cheering and chanting; there is exuberant handshaking, standing on chairs, shouting, and "money-humming".[2] The Dare people dress in expensive, modern clothes; they display large sums of cash, flaunting it to those present, and even at times throwing it about; they drive new and expensive automobiles, which are conspicuously parked in large numbers outside the meeting place. Dare speakers describe, usually in a frenzied manner, the wealth that awaits the prospects if they will purchase one of the plans. Films are shown, usually involving the "rags-to-riches" story of Dare founder Glenn W. Turner. The goal of all of this is to persuade the prospect to purchase a plan, especially Adventure IV, so that he may become a "salesman", and thus grow wealthy as part of the Dare organization. It is intimated that as Glenn W. Turner Enterprises, Inc. expands, high positions in the organization, as well as lucrative opportunities to purchase stock, will be available. After the meeting, pressure is applied to the prospect by Dare people, in an effort to induce him to purchase one of the Adventures or the plan. The sale is sometimes closed by the purchaser who brought the prospect to the meeting, but primarily, by Dare salesmen, specialists in the "hard sell."[3]

The format of the meeting is preordained. A script created by Dare is strictly adhered to. The format applies

[2]Although mention of "money-humming" is made at several points in the record, we are not certain what this activity entails, nor do we venture to guess.

[3]On at least some occasions prospects are told to acquire the necessary money through bank loans, by not being candid about the purpose of the loan, and by making simultaneous applications to a number of banks without informing each bank that more than one application is being made.

even to the sale, there being a standard procedure for inducing the prospect to sign his name to the agreement and to part with his money. While no express guarantee of success is made at the meetings, and the statement is made that the purchaser must expect to work, the impression which is fostered is of the near inevitability of success to be achieved by anyone who purchases a plan and follows Dare's instructions.

Dare also arranges, in addition to the Adventure Meetings, "GO Tours," or "Golden Opportunity Tours." Prospects are taken by plane or bus to one of Dare's regional centers where further meetings and sales efforts are undertaken. A significant effort is made during the trip itself to sell the plans to prospects. Much the same atmosphere as at the meetings pervades the trip—exuberant shouting, chanting, handshaking, relating of success stories, and lavish displays of cash.

In a scheme such as this, the possibility that a market will become "saturated" is a real one. Saturation has in fact occurred in some markets, but this is not mentioned at the meetings. Few, if any, purchasers of these plans have achieved any success remotely approaching that described by defendants and their agents.

B. The role of the purchaser-salesman.

Once he has bought a plan that empowers him to help sell the plans to others, the task of the purchaser is to find prospects and induce them to attend Adventure Meetings. He is not to tell them that Dare To Be Great, Inc. is involved. Rather, he catches their interest by intimating that the result of attendance will be significant wealth for the

prospect. It is at the meetings that the sales effort takes place. The "salesman" is also told that to maximize his chances of success he should impart an aura of affluence, whether spurious or not—to pretend that through his association with Dare he has obtained wealth of no small proportions. The training that he has received at Dare is aimed at educating him on this point. He is told to "fake it 'til you make it," or to give the impression of wealth even if it has not been attained. He is urged to go into debt if necessary to purchase a new and expensive automobile and flashy clothes, and to carry with him large sums of money, borrowing if necessary, so that it can be ostentatiously displayed. The purpose of all this is to put the prospect in a more receptive state of mind with respect to the inducements that he will be subject to at the meetings.

III. The Adventures and Plans as Securities.

The district court held that Adventures III and IV, and the $1,000 Plan were securities under the Securities Act of 1933, 15 U.S.C. §77a et seq. and the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq. The definitions of security that are found in each Act are almost identical.[4]

[4]The Securities Act of 1933 defines "security" as:
". . . any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest of participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing." 15 U.S.C. §77b(1)
The Securities Exchange Act of 1934 defines "security" as:
". . . any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agree-

Both definitions include the terms "investment contract," "certificate of interest or participation in any profit-sharing agreement," and any "instrument commonly known as a 'security'." The district court held that the plans in question fell into all three categories of securities. Because we find them to be investment contracts, we need not decide whether the other definitions are applicable as well.

The 1933 and 1934 Acts are remedial legislation, among the central purposes of which is full and fair disclosure relative to the issuance of securities, SEC v. W. J. Howey Co., 1945, 328 U.S. 293, 299; Tcherepnin v. Knight, 1967, 389 U.S. 322, 337. It is a familiar canon of legislative construction that remedial legislation should be construed broadly, Tcherepnin v. Knight, supra, 389 U.S. at 337. The

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ment or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a 'security' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to any purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited." 15 U.S.C. §78c(a)(10).

[5]The broad purpose of the Securities Act of 1933 was stated in the report of the Senate Committee on Banking and Currency, S. Rep. No. 47, 73d Cong., 1st Sess. 1 (1933):

"The aim is to prevent further exploitation of the public by the sale of unsound, fraudulent, and worthless securities through misrepresentation; to place adequate and true information before the investor; to protect honest enterprise, seeking capital by honest presentation, against the competition afforded by dishonest securities offered to the public through crooked promotion; . . . ."

Acts were designed to protect the American public from speculative or fraudulent schemes of promoters.[5] For that reason Congress defined the term "security" broadly, and the Supreme Court in turn has construed the definition liberally. In SEC v. Joiner Corp., 1943, 320 U.S. 345, the Court stated: "However, the reach of the Act does not stop with the obvious and commonplace. Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as matter of fact that they are widely offered or dealt in under terms or courses of dealing which established their character in commerce as 'investment contracts,' or as 'any interest or instrument commonly known as a "security" '." Id. at 351. In SEC v. W. J. Howey Co., supra, the Court stated that the definition of a security "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."[6] Id. at 299. And in the recent case of Tcherepnin v. Knight, supra, the Court stated, "[I]n searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality." Id. at 336. We approach the definition of a "security" with these admonitions in mind.

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[6]A sample listing of cases in which diverse schemes have been held to involve securities includes: Continental Marketing Corp. v. SEC, 10 Cir., 1967, 387 F.2d 466, cert. denied, 1968, 391 U.S. 905 (beavers); Roe v. United States, 5 Cir., 1961, 287 F.2d 435, cert. denied, 368 U.S. 824 (mineral leases); Los Angeles Trust Deed & Mortgage Exch. v. SEC, 9 Cir., 1961, 285 F.2d 162, cert. denied, 366 U.S. 919 (mortgages and deeds of trust); Penfield Co. of California v. SEC, 9 Cir., 1941, 143 F.2d 746, cert. denied, 323 U.S. 768 (whiskey sales contracts); SEC v. Crude Oil Corp. of America, 7 Cir., 1937, 93 F.2d 844 (crude oil sales contracts).

In SEC v. W. J. Howey Co., supra, the Supreme Court set out its by now familiar definition of an investment contract:

> "The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." Id. at 301.

In Howey the Court held that a land sales contract for units of a citrus grove, together with a service contract for cultivating and marketing the crops, was an investment contract and hence a security. The Court held that what was in essence being offered was "an opportunity to contribute money and to share in the profits of a large citrus fruit enterprise managed and partly owned by respondents." Id. at 299. The purchasers had no intention themselves of either occupying the land or developing it; they were attracted only "by the prospects of a return on their investment." Id. at 300. It was clear that the profits were to come "solely" from the efforts of others.

For purposes of the present case, the sticking point in the Howey definition is the word "solely," a qualification which of course exactly fitted the circumstances in Howey. All the other elements of the Howey test have been met here. There is an investment of money, a common enterprise,[7] and the expectation of profits to come from the efforts of others. Here, however, the investor, or purchaser, must himself exert some efforts if he is to realize a return

[7] A common enterprise is one in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties. See, e.g., Los Angeles Trust Deed & Mortgage Exch. v. SEC, 9 Cir., 1961, 285 F.2d 162, 172, cert. denied, 366 U.S. 919.

on his initial cash outlay. He must find prospects and persuade them to attend Dare Adventure Meetings, and at least some of them must then purchase a plan if he is to realize that return. Thus it can be said that the returns or profits are not coming "solely" from the efforts of others.

We hold, however, that in light of the remedial nature of the legislation, the statutory policy of affording broad protection to the public, and the Supreme Court's admonitions that the definition of securities should be a flexible one, the word "solely" should not be read as a strict or literal limitation on the definition of an investment contract, but rather must be construed realistically, so as to include within the definition those schemes which involve in substance, if not form, securities. Within this context, we hold that Adventures III and IV, and the $1,000 Plan, are investment contracts within the meaning of the 1933 and 1934 Acts.[8]

Strict interpretation of the requirement that profits to be earned must come "solely" from the efforts of others has been subject to criticism. See, e.g., State of Hawaii v. Hawaii Market Center, Haw. 1971, 485 P.2d 105. Adherence to such an interpretation could result in a mechanical, unduly restrictive view of what is and what is not an investment contract.[9] It would be easy to evade by adding

[8]We note that under the laws of three states defendants' promotions have been held to be securities: Hurst v. Dare To Be Great, Inc., D. Ore. (Civ. No. 71-160, Jan. 12, 1972); State of Idaho v. Glenn Turner Enterprises, Inc., Dist Ct. 4th Jud. Dist. Ida. (Civ. No. 47773, March 28, 1972); Frye v. Taylor, Dist. Ct. of Appeal, 4th Dist. Fla. (No. 70-952, March 9, 1972).

[9]See, e.g., Georgia Market Centers, Inc. v. Fortson, 1969, 171 S.E.2d 620; Gallion v. Alabama Market Centers, Inc., 1968, 213 So.2d 841. Compare State of Hawaii v. Hawaii Market Center, 1971, 485 P.2d 105.

a requirement that the buyer contribute a modicum of effort. Thus the fact that the investors here were required to exert some efforts if a return were to be achieved should not automatically preclude a finding that the Plan or Adventure is an investment contract. To do so would not serve the purpose of the legislation. Rather we adopt a more realistic test, whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.

In this case, Dare's source of income is from selling the Adventures and the Plan. The purchaser is sold the idea that he will get a fixed part of the proceeds of the sales. In essence, to get that share, he invests three things: his money, his efforts to find prospects and bring them to the meetings, and whatever it costs him to creat an illusion of his own affluence. He invests them in Dare's get-rich-quick scheme. What he buys is a share in the proceeds of the selling efforts of Dare. Those efforts are the sine qua non of the scheme; those efforts are what keep it going; those efforts are what produce the money which is to make him rich. In essence, it is the right to share in the proceeds of those efforts that he buys. In our view, the scheme is no less an investment contract merely because he contributes some effort as well as money to get into it.

Let us assume that in Howey, supra, the sales and service agreements had provided that the buyer was to buy and plant the citrus trees. Unless he did so, there would be no crop to cultivate, harvest and sell, no moneys in which he could share. The essential nature of the scheme, however, would be the same. He would still be buying, in exchange for money, trees and planting, a share in what

he hoped would be the company's success in cultivating the trees and harvesting and marketing the crop. We cannot believe that the Court would not have held such a scheme to be an investment contract. So here. Regardless of the fact that the purchaser here must contribute something besides his money, the essential managerial efforts which affect the failure or success of the enterprise are those of Dare, not his own.

Our holding in this case represents no major attempt to redefine the essential nature of a security.[10] Nor does our holding represent any real departure from the Supreme Court's definition of an investment contract as set out in Howey. We hold only that the requirement that profits come "solely" from the efforts of others would, in circumstances such as these, lead to unrealistic results if applied dogmatically, and that a more flexible approach is appropriate.

Affirmed.

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[10]See Coffey, The Economic Realities of a "Security": Is There a More Meaningful Formula?, 18 W. Res. L. Rev. 367 (1967) wherein Professor Coffey proposes new guidelines for determining the existence of a security.

APPENDIX B

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
v.

GLENN W. TURNER ENTERPRISES, INC.,
a Florida corporation, et al., Defendants.

Civ. No. 72-390.

United States District Court,

D. Oregon.

Aug. 30, 1972.

OPINION WITH FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

SKOPIL, District Judge:

On May 17, 1972, the Securities and Exchange Commission filed the complaint against defendants, seeking an injunction against violation of the federal securities laws, and other relief. The SEC contended that what defendants were selling were securities within the meaning of the statutes. The defendants denied that they were securities and, consequently, moved to dismiss on the grounds that the Court had no jurisdiction over this action. Various memoranda were filed, numerous affidavits and exhibits were presented, and the Court held hearings on the application for a preliminary injunction, appointment of a receiver and an accounting on July 11, 12, 13 and 14, 1972. After the hearings were concluded, the Court heard oral argument on August 14, 1972. Before that hearing the

Court had indicated to the parties that all reserved rulings on the admissibility of evidence would be decided in favor of admissibility and the parties were instructed to argue with that understanding. Both sides rested with respect to the request for a preliminary injunction at the conclusion of oral argument. Accordingly, this matter is now ripe for decision.

I

FINDINGS OF FACT

A. THE DEFENDANTS.

1) Glenn W. Turner Enterprises, Inc. is a Florida corporation.

2) Dare to be Great, Inc., also a Florida corporation, is a wholly-owned subsidiary of Glenn W. Turner Enterprises, Inc.

3) The individual defendants, Turner, Wilder, Atkinson, O'Brien, Smith, Monroe, Everard, and Arthur are, or were, officers, directors or employees of the defendant corporations.

4) The defendant Sant has not been linked to these proceedings.

B. THE ADVENTURES.

5) Dare to be Great, Inc. offers to sell to the public a series of contracts which it calls "Adventures" and classifies as motivational or self-improvement courses.

The purchaser of Adventure 1 receives a portable tape recorder, 12 lessons contained in 12 tape recordings, and certain written material in notebooks. He is entitled to attend a 12 to 16-hour group session. The cost of Adventure 1 is $300.

Adventure 2 contains, in addition to the materials offered in Adventure 1, twelve additional lessons with tape recordings. It offers approximately 80 additional hours of group sessions. Adventure 2, which necessarily includes Adventure 1, costs $700. In other words, a purchaser of Adventure 1 must pay an additional $400 for Adventure 2. Adventure 2 is not sold without Adventure 1.

The purchaser of Adventure 3 receives, in addition to the material from Adventures 1 and 2, six additional tape recordings, one notebook of written material called "The Fun of Selling," and a limited amount of written instructions and material. The purchaser of Adventure 3 is also entitled to 30 additional hours of group sessions. This Adventure costs $2,000, or $1,300 in addition to the cost of Adventures 1 and 2, which are necessarily included in Adventure 3. The purchaser of Adventure 3, however, receives an additional benefit different in kind from those available in Adventures 1 and 2. After fulfilling relatively nominal requirements, he becomes an "Independent Sales Trainee" and is empowered to "sell" the Adventures. He receives $100 for each Adventure 1, $300 for each Adventure 2, and $900 for each Adventure 3 which he "sells."

The purchaser of Adventure 4 receives six additional tapes, may or may not receive a movie projector with six cartridge-type films, and has the opportunity for 30 additional hours of group sessions. He is also entitled to attend

two other week-long courses at his own expense in Florida. For this he pays an additional $3,000, or a total of $5,000 for Adventure 4, which includes the preceding Adventures. He also becomes designated as an "Independent Sales Agent," entitled to "sell" all of the Adventures to others. He receives the same return as does the purchaser of Adventure 3. However, in addition, he is entitled to "sell" Adventure 4, for each of which he receives $2,500, or half the purchase price.

Defendants offer a variation on the Adventures which was referred to in testimony as the "$1,000 Plan." The purchaser of this plan receives the tape cassettes sold in Adventure 2 but without the written material which accompanies them. In addition, a purchaser of this plan receives some additional sales instruction and may be entitled to a 24-hour group session. Unlike a purchaser of Adventure 2, however, he has an opportunity to make money from this plan if he brings two additional individuals to the one who sold him his plan. If those additional individuals purchase the plan, he then becomes entitled thereafter to receive $400 out of each $1,000 paid for the purchase of the plan by any further additional purchasers of the plan who purchase through him. Each additional purchaser, of course, must in turn bring him yet three more in order for that additional investor to become entitled to income from this plan.

It is possible to enter this plan without making an investment by bringing in one extra person, i.e., three rather than two.

C. THE SYSTEM IN OPERATION.

6) Salesmen of these Adventures seek new customers anywhere. They accost strangers in stores, streets and elsewhere and make no attempt to search out persons with sales ability, financial acumen or other skills. Those who eventually do make purchases appear to have fairly limited resources and education.

7) Salesmen must not explain to prospects anything about what they are selling. Their duty is strictly limited to arousing curiosity in the prospect and persuading him to attend an "Adventure Meeting," organized by defendants. One of the principal methods of arousing curiosity which is demanded by defendants is that the salesmen make a display of great wealth. A salesman should drive an expensive car, wear expensive clothing and display large amounts of currency in high denominations, while intimating that the prospect also can have an opportunity for great wealth. Despite the display, the salesman may, in fact, be nearly destitute.

8) The principal selling effort occurs at meetings and other functions organized by defendants. The salesman has no control over these meetings. The atmosphere is one of potential overwhelming financial return, dramatized by the appearance of large numbers of expensive cars, expensively-dressed individuals, and stories of great riches achieved through defendants' operations.

9) Meetings are conducted with an appearance of great spontaneity. Speakers talk loudly and rapidly with great emotional fervor. There are cheers and chants from the audience. The speakers, however, follow a strict script

written by defendants' central organization, and they are not permitted to depart from it. The cheers and chants are prearranged. The speakers make somewhat passing reference to the motivational courses and what they will do for individuals. The major emphasis, however, is on the opportunities for earning money by purchasing Adventure 4. The script followed by defendants' speakers carefully avoids actually guaranteeing a return and does contain a statement that the prospect must expect to work. The impression which is fostered, however, by emphasis and psychological technique, is on the near inevitability of success achieved by anyone who follows defendants' directions. For example, it is said that one individual earns $50,000 per month, which is described as an unusual achievement, although the salesman was an ordinary person. A housewife's earnings of $16,000 per month are called "good." Some people earn nothing, which is described as "very poor," and is attributed to their failure to "believe in the philosophy of millionaires."

10) At no time do defendants' agents make any effort to explain potential difficulties of saturation and pyramiding. It is not revealed that those who make the pitch are far from earning the amounts which they say are ordinary results.

11) After the speakers have finished, salesmen attempt to persuade the prospect to buy one of the Adventures, with emphasis on Adventure 4. Sometimes the individual salesman makes this offer, but at other times, agents of defendants who are specialists at the required techniques of psychological hard-sell take over and accomplish the sale. On occasion the sale has been accomplished in the name of the individual who gets credit for it, without the latter

even having been present. Sales tactics which are employed are calculated to ignore and bypass rational objections and analysis. The emphasis is, again, on large amounts of easy money. The technique is so strictly prearranged that it contains, for example, instructions how to write $130,000 and other sums on the paper, and to avoid asking the prospect to sign a contract because that sometimes triggers the response of wanting to read it. On at least some occasions, potential customers who object that they do not have the money required are told how they may get bank loans by deceiving the banks as to the purpose of the loan, and by making simultaneous applications at a number of different banks without informing any of them that the other applications have been made.

12) The prospects are also encouraged with great emphasis on the possibility that by "getting in on the ground floor," they will have opportunities for future lucrative investments and employment in defendants' forthcoming ventures.

13) Prospects who have not succumbed at the Adventure Meetings may be taken on a "go-tour" to one of defendants' regional centers by airplane or bus. They are brought to an environment where they are isolated from other contact and are surrounded by defendants' agents and employees. The same psychological techniques and the same kinds of representations as they use at the meetings are employed on these tours.

14) Few, if any, purchasers of these Adventures have achieved any success remotely approaching that described by defendants' agents, to their financial and emotional distress.

15) Saturation of the market has, in fact, occurred at least in some localities. Purchasers have found themselves unable to resell the Adventures to others because those whom they approach either have already purchased or else have been made wary by having been approached by other salesmen.

II

CONCLUSIONS OF LAW

A.

It is apparent from this Court's findings of fact that the defendants are promoting a type of scheme commonly known as a pyramid operation. Pyramid schemes are inherently unstable and eventually must collapse. As the SEC has pointed out, there is inevitably a limit to the number of investors who can get their money back. Investors get a return only so long as increasing numbers of others like them invest their own money. Consequently, it is certain that the source of funds must eventually dry up leaving a large proportion of the investors stranded with their losses. In this respect, the scheme is closely analogous to so-called chain letters which are unmailable under the provisions of the Mail Fraud Statute, 18 U.S.C. §1341. The question for this Court is whether what defendants offer their investors is a security within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934.

B.

The Supreme Court has insisted that the Securities Acts must be interpreted liberally and broadly. It has

rejected narrow and strict construction in order to carry out the remedial purposes of the legislation. Securities and Exchange Commission v. W. J. Howey Co., 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946). In the same opinion the court approved a certain interpretation of the Securities Act of 1933 because it embodied

> . . . a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits. 328 U.S. at 299. 66 S.Ct. at 1103.

The very purpose of the statutes would be violated if they were construed to apply only to familiar and conventional transactions and were not capable of adaptation to novel and irregular schemes fairly covered by the intent and text of the statutes. Thus, the Supreme Court has said that in interpreting these acts, "form should be disregarded for substance and the emphasis should be on economic reality." Tcherepnin v. Knight, 389 U.S. 332, 336, 88 S.Ct. 548, 553, 19 L.Ed.2d 564 (1967). Years before, the Supreme Court had stated that the test of the applicability of these acts was "what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect." Securities and Exchange Commission v. C. M. Joiner Leasing Corp., 320 U.S. 344, 352-353, 64 S.Ct. 120, 124, 88 L.Ed. 88 (1943).

It is apparent that defendants' pyramid promotion contains the same evils which the Securities Acts are intended to suppress. Defendants have devised a novel scheme to seek the use of money of others on the promise of profit

to them. Defendants stated to the Court, and the Court agrees, that compliance by defendants with the provisions of the Securities Acts would mean the death of this enterprise. In the opinion of the Court, this is so because the disclosure and anti-deception provisions of the statutes would be totally inimical to the success of the promotion, for it is based upon blinding potential prospects to the realities of the scheme.

[1] Defendants argue that what they offer their prospects are not securities nor investments but in reality products and services. It is true that in each of the various "Adventures" there are tape recordings, printed materials and various devices which are made available to the adventurers. Without passing judgment on the quality or value of these materials, it is nevertheless obvious that defendants are involved in much more than the mere sale of a product. There are distinct promises made to potential customers and, consequently, it is the duty of the Court to consider them separately. Securities and Exchange Commission v. United Benefit Life Ins. Co., 387 U.S. 202, 207-209, 87 S.Ct. 1557, 1559-1561, 18 L.Ed.2d 673 (1967). The evidence presented by the SEC indicates that defendants have promoted their scheme as an investment and have so represented it to the objects of their sales efforts. In this context the Supreme Court's remark in Joiner is apropos:

> [I]t is not inappropriate that promoters' offerings be judged as being what they were represented to be. 320 U.S. at 353, 64 S.Ct. at 124.

It is equally clear from the evidence that the purchasers of the higher-priced Adventures thought they were paying

for something more than the materials. That something was the promise and expectation of a return on their investment. It is primarily for these reasons that under the laws of three different states the offerings of defendants have been construed to be investments in securities, and consequently, in violation of state laws governing the sale and promotion of such schemes.

[2] There is little doubt, then, that defendants are soliciting investments on a grand scale from individuals of relatively limited resources and education. As defendants tirelessly emphasized, it is nevertheless true that in order to subject them to the provisions of the securities acts, it must be determined that they are offering and selling securities as that term is used in the statutes.

[3, 4] Throughout these proceedings, defendants have taken the unjustified position that the opportunities offered in their contracts to potential customers are securities only if they are "investment contracts." Statutory definitions, however, are considerably more inclusive. In the Securities Act of 1933, 15 U.S.C. §77b(1),

> The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in,

> temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

In the Securities Exchange Act of 1934, 15 U.S.C. §78c(10),

> The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

It is obvious that whether or not this promotion offers investment contracts, it offers securities for sale so long as any one or more of the terms used in the statutes are satisfied.

C.

[5] The SEC suggested that defendants' offering satisfied the general categories of the statutes, i.e., "in

general, any interest or instrument commonly known as a 'security'." As far as can be determined, these general phrases have not been applied by any court, and there are no precedents directly in point for the guidance of this Court. However, as a principle of statutory construction, these general categories cannot be disregarded or construed as devoid of meaning. Considering the nature of these statutes, the inclusion of these general phrases is yet another indication of the strength of the congressional desire that the statute be interpreted broadly, flexibly and liberally. Congress wanted to provide no loopholes for promotions in conflict with the purposes of the securities laws.

[6] The Court doubts that Congress intended that in order to qualify under these general categories, a transaction must be commonly known to the man in the street as a security. Most securities are rather technical in nature and not likely to be understood except by the legal or financial community. It is sufficient that an offering be considered as a legal matter to be a security, regardless of the popular perception of it. Since the Supreme Court has indicated that it is appropriate to look to state law to give content to the terms used in the definition, Howey, supra, state decisions may be a most trustworthy authority on what is commonly known as a security.

State courts have made admirable efforts to interpret the securities laws consistent with their purposes. Over ten years ago, the California Supreme Court articulated a test which simply recognized that the subjection of the investor's money to the risk of an enterprise over which he exercises no managerial control is the basic economic reality of a security transaction. Silver Hills Country Club

v. Sobieski, 55 Cal.2d 811, 13 Cal.Rptr. 186, 361 P.2d 906 (1961). The California test, called the "risk capital" test, has since been substantially adopted by courts in a number of states; State of Hawaii by Commissioner of Securities v. Hawaii Market Center, Inc., 485 P.2d 105 (1971); Hurst v. Dare to be Great, Inc., Civ. No. 71-160, (D. Or., January 12, 1972); State ex rel. Healy v. Consumer Business System, Inc., 92 Or. Adv. Sh. 287, 482 P.2d 549 (Ct. of Appeals, 1971); Venture Investment Co., Inc. v. Schaefer, Civ. No. C-2732 (D. Colo., June 16, 1972); Mr. Steak, Inc. v. River City Steak, Inc., 324 F.Supp. 640 (D. Colo. 1970), aff'd., 460 F.2d 666 (10th Cir. 1972); State of Idaho v. Glenn Turner Enterprises, Inc., Civ. No. 47773 (Dist. Ct., 4th Jud. Dist., March 28, 1972). By applying the risk capital test, defendants' promotions have been held to be securities under the laws of Oregon and Idaho; Hurst, State of Idaho, supra. They have also been held to be securities as well as a lottery under the laws of the state of Florida, Frye v. Taylor, 263 So.2d 835 (Fla.Dist. Ct. of Appeal, 4th Dist., 1972). Although not entirely clear, it appears that the Florida court adopted the risk capital approach because it cited Healy as the basis for its determination.

[7] The spread of the risk capital theory from the state in which it was first applied to other states and the favorable comment with which it has been received make it an appropriate test to look to for determining what is "commonly known as a security." There probably have been few schemes devised that more closely meet the test than does the defendants' promotion. In the opinion of the Court, both the letter and the purposes of the statutes are satisfied by holding, therefore, that defendants are

offering and selling contracts which are commonly known as securities within the meaning of the federal statutes.

D.

The issue which was most thoroughly litigated was whether these contracts are "investment contracts" within the meaning of the statutes. The Supreme Court first defined the term "investment contract" in Howey, wherein it said:

> [A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party. . . . 328 U.S. at 298-299, 66 S.Ct. at 1103.

What defendants offer their prospects easily meets the first two criteria of this three-part test. As noted previously, the contracts were regarded as investments both by sellers and purchasers. Similarly, this promotion embodied a common enterprise, for any return to the investors depended upon the defendants' success in inducing yet more people to invest their money.

The real sticking point in the definition of an investment contract is the requirement that investors expect profit solely from the efforts of others. Defendants stress that investors are told they must do sales work in order to get any return at all. The "work" required of investors is to persuade additional individuals to come to meetings organized by defendants where they may be subjected to the full force of defendants' hard sell. Furthermore, they

are encouraged to make ostentatious displays of wealth to deceive prospective customers. Defendants, therefore, conclude that the profits in this enterprise do not come solely from defendants' own efforts but rather are dependent in whole or in part upon the efforts of the investors themselves. It follows, they argue, that these transactions are not investment contracts within the Supreme Court's definition and that, consequently, they are not securities within the meaning of the statutes.

It is by no means clear that the Supreme Court intended its three-pronged definition of an investment contract to be a litmus test which must be applied literally and strictly. A narrow focus on this particular locution seems anomalous for the court has already said, in interpreting the statutes themselves, that liberal and broad interpretations are required in order to carry out the intent of Congress. From this flows the court's stress on the economic realities behind transactions, on substance rather than form. Furthermore, in this particular area of the law, to insist upon a strict application of a definition would inevitably lead to the exploitation of loopholes created by that definition. For example, if the "solely from the efforts of others" test were to be applied strictly as defendants urge, any number of devices can be invented to avoid that test. Promoters could require some nominal effort of their would-be investors along with the contribution of their money, such as solving a puzzle or writing an essay. This Court has doubts that either the Supreme Court or the Courts of Appeals would sanction such efforts to evade the securities laws.

In cases which have construed the "solely from the efforts of others" test, the emphasis has been on the economic

realities in each case. Although the Court of Appeals underscored the test in Chapman v. Rudd Paint and Varnish Co., 409 F.2d 635 (9th Cir. 1969), the franchise agreement in that case which was unsuccessfully alleged to be a security contemplated a major and controlling role for the plaintiff-franchisee. The extensive efforts of the franchisor were devoted mainly to equipping and stocking that franchise after which point it was turned over to the franchisee and became dependent upon his efforts. In another case in which the franchise agreement was alleged to be a security, the emphasis on the role played by the franchisee was even more apparent. Mr. Steak, supra. The court there found it necessary to weigh the relative participation in the control of the franchised restaurant before determining that the substantial degree of authority held by the franchisee was inconsistent with a securities transaction. See also Romney v. Richard Prows, Inc., 289 F. Supp. 313 (D. Utah 1968), in which the plaintiff was unsuccessful in attempting to have the transaction declared an investment contract because he had an important role in the success or failure of the enterprise.

The most essential consistency in the cases which have considered the meaning of "investment contract" is the emphasis on whether or not the investor has substantial power to affect the success of the enterprise. When his success requires professional or managerial skill on his part, and he has authority corresponding with his responsibility, his investment is not a security within the meaning of the securities acts. When he is relatively uninformed and unskilled and then turns over his money to others, essentially depending upon their representations and their honesty and skill in managing it, the transaction is an investment contract.

[8] In applying the Supreme Court's definition of an investment contract, therefore, the efforts of others which are relevant for purposes of the definition are those essential managerial efforts which affect the failure or success of the enterprise. In this context, there are several significant aspects to defendants' promotion. First, they seek to entice anyone who can pay the cost of the "Adventures," without regard to their education, sales and managerial skills. In fact, defendants are apparently most successful with individuals of limited ability and resources who have no particularly appropriate skills. It is irrelevant that some of the investors may have been adroit at this kind of sales tactics because defendants have offered the promotion to all, and the securities acts prohibit the offer as well as the sale of unregistered, nonexempt securities. Securities and Exchange Commission v. Howey Co., 328 U.S. at 300-301, 66 S.Ct. 1100. Second, the "efforts" of these investors are in practice limited to approaching other people and soliciting them to come to meetings organized by defendants. Their role is so limited that they are not even permitted to tell their quarry the nature or purpose of the meeting. The significant efforts in this promotion are the specialized, professional, high-powered tactics used at these meetings by defendants, and the ordinary investors by themselves would be unsuccessful at persuading anyone else of parting with $2,000 to $5,000. The SEC aptly paraphrased the Supreme Court opinion in Joiner by characterizing defendants' revival-type sales methods as the common thread upon which everybody's beads were strung. Third, the success of any investor depends on a factor of which he is not made aware, i.e., saturation of the market as the pyramid expands. Saturation is important at every stage, but eventually it, along with general awareness of it, must become the only important factor,

at which time efforts of the investor are simply irrelevant, even if he spends all his time in futile efforts to sell the unsellable. Since what defendants offer and sell is the right to sell the right to sell ad infinitum, this ultimate irrelevance of investors' efforts is inherent in any offer to sell. In contrast to an investor's ineffectual efforts, the degree of saturation is defendants' responsibility. Accordingly, the Court concludes that the efforts which are significant to the success or failure of this enterprise are those of defendants and that, consequently, their promotion constitutes an offer of an investment contract within the meaning of the Securities Act and the Securities Exchange Act.

This Court's conclusions are buttressed by the historical antecedents of the Supreme Court definition of an investment contract. In Howey that term was given the meaning that it had under state law at the time of the enactment of the Securities Act. The case which apparently was the principal source of that definition was State v. Gopher Tire and Rubber Co., 146 Minn. 52, 177 N.W. 937 (1920). In that case, decided before the enactment of the federal statutes, the state court held that a scheme analogous to that in question here which required investors to solicit additional customers was an investment contract and, consequently, a security within the meaning of the state laws.

E.

Initially, the SEC's principal legal theory apparently was that the contracts offered by defendants were certificates of interest or participation in profit-sharing agreements, as that term is used in the statute. Defendants hardly replied to this theory, however, and consequently there was little discussion of it.

[9] Although this category of security has been subjected to considerably less judicial interpretation than the term investment contract, it would seem that its plain meaning encompasses these transactions. What the investors receive, after all, is a right to a cut of the profits from other investors. In the opinion of this Court, it is immaterial that the entire profits in Dare to be Great are not divided up among all the investors and that they are only entitled to the profit from a particular designated source. In other words, an agreement to share some profits is within the meaning of the statutes as well as an agreement to share all profits.

It should be recalled that the "solely from the efforts of others" test is part of the definition of investment contract, not of the definition of security. More specifically, the Supreme Court has not said that in order for a transaction to constitute a certificate of interest or participation in a profit-sharing agreement it must contemplate no effort on the part of the investor. Even if the "solely" test should be applied to this type of security as well, the Court concludes for the reasons set forth above that that test is met here and that these contracts also are certificates of interest and participation in profit-sharing agreements as well.

III

RELIEF

[10] Defendants deny that they are violating any securities laws and insist that they are entitled to continue what they contend are legitimate business activities. They have given no indication that they will voluntarily

cease violations of the statutes. Accordingly, the injunctive relief requested by the SEC is appropriate to prevent further violations and to protect the public. Defendants will be enjoined from selling, or offering to sell, the so-called Adventure 3 and Adventure 4 in violation of law. Adventures 1 and 2 do not appear to involve any security inasmuch as the purchasers of them are not given to expect any return from them. The so-called "$1,000 Plan" is no less a pyramid promotion and a security than Adventures 3 and 4, and, consequently, will also be enjoined.

The injunction will be directed against the corporate defendants, Glenn W. Turner Enterprises, Inc. and Dare to be Great, Inc. Of course, the order will include all officers, agents and employees of the corporate defendants, and by the terms of the order they must be informed of it. The role of the individual named defendants is not sufficiently developed in these proceedings to warrant injunctive relief specifically against them now, particularly in light of the evidentiary objections raised on their behalf. However, should the relief granted herein prove to be insufficient, the SEC may, of course, present a motion to broaden the injunction and will be afforded an opportunity to make a proper showing that it is necessary.

[11] The Court recognizes that this order may have a drastic effect upon defendants' business. Since the decision rests in part on relatively untried legal theories, the order against selling or offering for sale securities will be stayed for ten days in order to afford time to seek further relief from another forum. However, effective immediately, defendants are prohibited from withdrawing any funds or assets from the corporate defendants other than in the regular and ordinary course of business. Los Angeles Trust

Deed & Mortgage Exchange v. Securities and Exchange Commission, 264 F.2d 199, 213 (9th Cir. 1959).

The SEC has not shown that the corporate defendants are insolvent or that the appointment of a receiver is otherwise appropriate.

The request for an accounting will similarly be denied since the SEC has not made a showing that this relief is either proper or necessary.